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NO. 82-6597

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RUBEN C. ZARAGOZA,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the evidence show beyond a reasonable doubt that petitioner killed the victim, and is a sentence of death permissible in such a case?

2. Has the Arizona Supreme Court construed the phrase "especially heinous, cruel or depraved" in such a way so that it gives proper guidance to the sentencing authority?

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STATEMENT OF THE CASE

Winifred Duggan, the victim in this case, was a 78-year-old woman. A lobotomy had been performed on her sometime in the 1930's, and she had limited mental capabilities and was easy to manipulate.

At about 8:30 or 8:45 on the evening of May 26, 1981, petitioner and Winifred Duggan were seen in a liquor store near Sixth Avenue and Van Buren in Phoenix. Winifred appeared to be unaware of where she was, and petitioner was controlling her. Petitioner had Winifred's purse and refused to give it to her when she reached for it. Petitioner took money out of the purse and bought a can of beer and a pint bottle of white port wine. They then left the store.

Some time between 9:00 and 10:00 that same evening, petitioner and Winifred approached some people who were drinking beer on the porch of their apartments on Sixth Avenue. Winifred appeared to be nervous or scared, and petitioner spoke for her whenever she was spoken to. Petitioner and Winifred remained there for 15 to 20 minutes. During that time both of them were seen drinking beer.

At 11:10 that night, petitioner was seen in the alley behind the same apartments on Sixth Avenue. He climbed up on a metal utility box and pulled some clothes off the top of the building across the alley from the apartments. He then threw several objects onto the roof of that building.

The following morning, Winifred Duggan's body was found in the alley a short distance from the apartments. The body was naked except for a bra (which had been pushed up exposing her breasts) and a pair of sandals. Winifred Duggan had several head wounds caused by blows from some blunt object. She bled to death as a result of those wounds. She also had a bruise at the back edge of her vagina that was consistent with penetration by a penis or finger. A foreign pubic hair that matched appellant's was found meshed with the victim's own public hair.

Police officers found some bloody clothes, two bloody beer bottles, and a bloody white port wine bottle on the roof of the building across from the apartments on Sixth Avenue. The bottles also had some white hair stuck to them, and some identifiable latent fingerprints on them. The blood and hair on the bottles matched the victim's, and the prints matched petitioner's. Petitioner's fingerprint was also found on one of three bloody paper bags found near the body.

Petitioner was arrested later that morning. He admitted having been with the victim the night before but denied killing her. He was charged with first degree premeditated murder and first degree felony murder alleging that he killed the victim while committing or attempting to commit robbery or sexual assault. At the close of the evidence at trial, the court directed a verdict of acquittal on the premediated murder charge.

On September 28, 1981, a jury found petitioner guilty of first degree murder in violaton of Ariz.Rev.Stat.Ann. § 13-1105(A)(2). An aggravation-mitigation hearing was set for October 26, 1981. Because petitioner on probation for a prior aggravated assault conviction at the time of the murder, the disposition hearing in connection with the probation revocation was also set for October 26, 1981. At the hearing on October 26, the trial court revoked petitioner's probation and sentenced him to 1.875 years in prison for aggravated assault. The court then sentenced petitioner to death for the first degree murder. Appeal was automatic. The Arizona Supreme Court affirmed the judgment and sentence. State v. Zaragoza, ___ Ariz. ___, 659 P.2d 22 (1983). This petition for certiorari followed.

JURISDICITION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

ARGUMENTS

I

BECAUSE THE EVIDENCE SHOWS BEYOND A REASONABLE DOUBT THAT PETITIONER KILLED THE VICTIM, THE SENTENCE OF DEATH IS PROPER.

Petitioner contends that his sentence of death is unconstitutional because the state failed to prove that he intended to kill the victim. For this he relies upon Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). That case contains the following language:

> It was thus irrelevant [under Florida law] to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments.

102 S.Ct. at 3372, 73 L.Ed.2d at 1146 (emphasis added).

> While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither "wholly unanimous among state legislatures," . . . .

102 S.Ct. at 3374, 73 L.Ed.2d at 1149 (emphasis added).

> At issue is the number of states which authorize the death penalty where the defendant did not kill, attempt to kill, or intend to kill.

102 S.Ct. at 3374 n.15, 73 L.Ed.2d at 1149 n.15 (emphasis added).

> The fact remains that we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die.

102 S.Ct. at 3376, 73 L.Ed.2d at 1151 (emphasis added).

> Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the

> course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

102 S.Ct. at 3376-77, 73 L.Ed.2d at 1151 (emphasis added).

> We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act."

102 S.Ct. at 3377-78, 73 L.Ed.2d at 1152-53 (emphasis added, citations omitted).

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

102 S.Ct. at 3379, 73 L.Ed.2d at 1154 (emphasis added). It seems from the above language that a sentence of death is proper if the defendant (1) killed, or (2) attempted to kill, or (3) intended to kill, or (4) contemplated that life would be taken, or (5) intended that lethal force

would be used, or (6) contemplated that lethal force would or might be used by others.

Petitioner was the only person on trial for the murder of Winifred Duggan. The jury verdict of guilty of first-degree murder means that the state proved beyond a reasonable doubt that petitioner killed the victim. The sentence of death is therefore proper under Enmund v. Florida, supra.

Petitioner further contends that the state placed upon him the burden of proving that he did not intend to kill the victim. Under the Arizona statute, once the defendant has been found guilty, and once the state has proved beyond a reasonable doubt the existence of one or more aggravating circumstances, then the defendant has the burden of proving mitigating circumstances. Ariz.Rev.Stat.Ann. § 13-703(C). The language quoted by petitioner is the statement by the Arizona Supreme Court that petitioner failed to meet his burden of showing that submitting the case to the jury under a felony-murder theory was a mitigating circumstance. State v. Zaragoza, supra, ___ Ariz. at ___, 659 P.2d at 29. This Court has never held that it is unconstitutional to place upon the defendant the burden of establishing mitigating circumstances, and the United States District Court for the District of Arizona has approved of such a system. Richmond v. Cardwell, 450 F.Supp. 519, 524-25 (D.Ariz. 1978).

II

THE ARIZONA SUPREME COURT HAS PROPERLY CONSTRUED THE PHPASE "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED."

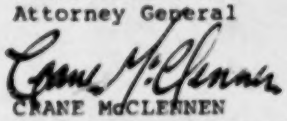
Petitioner contends that the phrase "especially heinous, cruel or depraved" as use as an aggravating circumstance in Ariz.Rev.Stat.Ann. § 13-703(F)(6) is unconstitutionally vague and overbroad. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), this Court held that similar language is permissible for use as an aggravating circumstance provided that it is properly construed so that it may give adequate guidance to the sentencing authority. Gregg v. Georgia, supra, 428 U.S. at 201; Proffitt v. Florida, supra, 428 U.S. at 255-56. The Arizona Supreme Court has issued numerous opinions construing this phrase. See Exhibit "A." In Arizona, sentencing is done by the trial judge. Ariz.Rev.Stat.Ann. § 13-703(B),(E). A trial judge who must determine whether the killing is "especially heinous, cruel or depraved" can read these cases and use them for guidance. Because this will sufficiently direct and limit the discretion of the sentencing authority, it satisfies the requirements of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and Gregg v. Georgia, supra.

CONCLUSION

Because petitioner has failed to show a violation of any constitutional right, this Court should deny the Petiton for Certiorari.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



CRANE McCLENNEN
Assistant Attorney General

Attorneys for RESPONDENT

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

CRANE McCLENNEN, being first duly sworn upon oath, deposes and says:

That he served the attorney for the respondent in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

MICHAEL G. SULLIVAN
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85003
Attorney for PETITIONER

this 16th day of May, 1983.

Crane McClennen
CRANE McCLENNEN

SUBSCRIBED AND SWORN to before me this 16th day of May, 1983.

Elizabeth J. Bendes
NOTARY PUBLIC

My Commission Expires:

July 17, 1986

CR31-247
1945D:bb

EXHIBIT "A"

CASES CONSTRUING THE PHRASE
"HEINOUS, CRUEL OR DEPRAVED"

State v. Gerlaugh, ___ Ariz. ___, ___, 659 P.2d 642, 643-44 (1983).

State v. Zaragoza, ___ Ariz. ___, ___, 659 P.2d 22, 28-29 (1983).

State v. Gretzler, ___ Ariz. ___, ___, 569 P.2d 1, 9-12 (1983).

State v. Woratzeck, ___ Ariz. ___, ___, 657 P.2d 865, 870 (1982).

State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982).

State v. Blazak, 131 Ariz. 598, 604, 643 P.2d 694, 700, cert. denied, ___ U.S. ___, 103 S.Ct. 189, 74 L.Ed.2d 149 (1982).

State v. Ortiz, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), cert. denied, ___ U.S. ___, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982).

State v. Tison (Ray), 129 Ariz. 546, 555, 633 P.2d 355, 364 (1981), cert. denied, ___ U.S. ___, 102 S.Ct. 180, 74 L.Ed.2d 147 (1981).

State v. Tison (Rick), 129 Ariz. 526, 542-44, 633 P.2d 335, 351-53, cert. denied, 454 U.S. 848 (1981).

State v. Vickers, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981).

State v. Bishop, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1980).

State v. Clark, 126 Ariz. 428, 436-37, 616 P.2d 888, 896-97, cert. denied, 449 U.S. 1067 (1980).

State v. Ceja, 126 Ariz. 35, 39-40, 612 P.2d 491, 495-96 (1980).

State v. Steelman, 126 Ariz. 19, 26, 612 P.2d 475, 482, cert. denied, 449 U.S. 913 (1980).

State v. Madsen, 125 Ariz. 346, 352, 609 P.2d 1046, 1052, cert. denied, 449 U.S. 873 (1980).

State v. Lujan, 124 Ariz.365, 372-73, 604 P.2d 629, 636-37 (1979).

State v. Brookover, 124 Ariz. 38, 40-41, 601 P.2d 1322, 1324-25 (1979).

State v. Watson, 120 ariz. 441, 448, 586 P.2d 1253, 1260 (1978), cert. denied, 440 U.S.924 (1979).

State v. Ceja, 115 Ariz. 413, 417, 565 P.2d 1274, 1278 (1977).

State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908 (1978).

State v. Blazak, 114 Ariz. 199, 206, 560 P.2d 54, 61 (1977).